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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

MARK HUTNYAN,

Plaintiff,

v.

DIANE CAFFERATA HUTNYAN;
 KRISTIAN HERZOG Also Known As
 KRIS HERZOG, Individually and
 Doing Business As THE BODYGUARD
 GROUP OF BEVERLY HILLS;
 COUNTY OF LOS ANGELES;
 RICKY TYSON; EDDIE CARTER;
 GLENN VALVERDE;
 NICHOLAS JOHNSTON;
 GERMAINE MOORE;
 CITY OF MANHATTAN BEACH;
 RYAN SMALL; CHAD SWANSON;
 CHRIS NGUYEN; TERESA MANQUEROS;
 and DOES 1 to 10, Inclusive,

Defendants.

Case No.: 2:17-cv-00545-PSG-ASx

**PLAINTIFF'S OPPOSITION TO
 DEFENDANT COUNTY OF LOS
 ANGELES' MOTION TO DISMISS
 PLAINTIFF'S COMPLAINT PURSUANT
 TO FRCP 12(b)(6); MEMORANDUM OF
 POINTS AND AUTHORITIES**

Date: July 10, 2017

Time: 1:30 p.m.

Courtroom: 6A

Judge: Hon. Philip S. Gutierrez

[Request for Judicial Notice filed concurrently]

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1 **TO THE HONORABLE COURT, ALL INTERESTED PARTIES AND TO THEIR**
 2 **ATTORNEYS OF RECORD:**

3 COMES NOW, Plaintiff Mark Hutnyan (“Hutnyan” or “Plaintiff”), who hereby submits
 4 the attached memorandum of points and authorities in opposition to defendant County of Los
 5 Angeles’ motion to dismiss pursuant to FRCP 12(b)(6):

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 7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Defendant County of Los Angeles (“County”) has filed a motion to dismiss claiming the
 10 unauthorized entry into Hutnyan’s home by its officers was not illegal because Hutnyan and his
 11 ex-wife, co-defendant Diane Cafferata Hutnyan (“Cafferata” or “MRS. HUTNYAN”) are
 12 parties to a Marital Settlement Agreement (See County’s Request for Judicial Notice;
 13 hereinafter the “MSA”), which she claims apparently allowed her to enter the home that
 14 Hutnyan had sole possession of for over the prior year, with a party of the individual deputy
 15 sheriff defendants, wearing tactical gear, using body cameras, under cover of darkness (10:00
 16 p.m.), unannounced through the use of a locksmith who drilled the lock out of the door to gain
 17 access.
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20 The reality is that under the guise of a claim of right to possession under the MSA,
 21 instead of simply contacting Hutnyan and requesting a mutually convenient date and time to
 22 come to the home that is the subject of the MSA, Cafferata, along with the co-defendants,
 23 consisting primarily of L.A. County Sheriff Department officers illegally entered the home and
 24 violated the MSA, while it was legally occupied by Hutnyan in violation of his civil rights,
 25 thereby causing the injuries and damages alleged in the complaint. In fact, the MSA specifically
 26 provides that Respondent (Hutnyan) will provide “Petitioner [Cafferata] with access to the
 27 marital residence **upon reasonable notice** from Petitioner [Cafferata]. (See MSA, p.11;
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emphasis added.) The conduct alleged in the complaint hardly constitutes “reasonable notice;” it constitutes extremely reckless and illegal conduct by all defendants who conspired to engage in the wrongful acts. In fact, the conduct of Cafferata and her co-defendants, as alleged in the complaint, ultimately resulted in a CLETS Order against Cafferata (See Plaintiff’s Request for Judicial Notice, Exhibit “2”).

As set further below, the complaint more than adequately asserts the causes of action alleged in the complaint to survive a motion to dismiss.

As set further below, the complaint more than adequately asserts the causes of action alleged in the complaint to survive a motion to dismiss.

II. STATEMENT OF FACTS

The following facts relevant to defendant’s motion are alleged in plaintiff’s complaint:

- On March 25 and March 26, 2016 at Plaintiff’s residence in Manhattan Beach (the “home”), Defendants, and each of them, unlawfully and forcefully entered the home without knocking, warning, notice, all in violation of Plaintiff’s civil rights under Fourth and Fourteenth Amendments of the United States Constitution and statutory law (Complaint, ¶ 26.)
- On or about March 3, 2015 DIANE CAFFERATA HUTNYAN (“MRS. HUTNYAN”) and Plaintiff entered into a Marital Settlement Agreement (“MSA”), wherein Plaintiff was awarded temporary sole possession of the home. Consistent with this Agreement MS. HUTNYAN vacated the home. (*Id.* at ¶ 29.)
- While Plaintiff still maintained sole possession of the home, pursuant to the MSA, MRS. HUTNYAN retained the services of Defendants HERZOG, a retired police officer, and THE BODYGUARD GROUP, to enter the home with MRS.

HUTNYAN armed with weapons to harass, threaten and intimidate Plaintiff. (*Id.*, ¶ 30.)

- HERZOG employs law enforcement officers, including Los Angeles County Sheriff's Deputies and other employees and agents of the County of Los Angeles, including named Defendants TYSON, CARTER, VALVERDE, JOHNSTON, MOORE (collectively "COUNTY EMPLOYEES"); and these named Defendants were so employed for this so-called assignment for MRS. HUTNYAN. (*Id.* at ¶ 31.)
- Defendant COUNTY OF LOS ANGELES knew or should have known that its officers, including the Defendant COUNTY EMPLOYEES routinely worked and continue to work off duty in so-called security positions including their work with Defendant HERZOG and THE BODYGUARD GROUP. (*Id.* at ¶ 32.)
- On or about March 23, 2016, the Defendants notified the CITY OF MANHATTAN BEACH, through the Manhattan Beach Police Department in writing by email that Defendants HERZOG and the COUNTY EMPLOYEES intended to enter the home with MRS. HUTNYAN armed with weapons and wearing body cameras. (*Id.* at ¶ 34.)
- On the same date, Defendants HERZOG and/or the COUNTY EMPLOYEES advised the CITY OF MANHATTAN BEACH through the Manhattan Beach Police Department in writing by email that Plaintiff would make a "fake" 911 call to Defendant Manhattan Beach Police Department when Defendants HERZOG, the COUNTY EMPLOYEES and MRS. HUTNYAN entered the home. (*Id.* at ¶ 35.)
- On the same date, Defendants HERZOG and/or COUNTY EMPLOYEES advised the CITY OF MANHATTAN BEACH by a telephone call with Defendant RYAN SMALL, Lieutenant with the Manhattan Beach Police Department, that HERZOG

1 and the COUNTY EMPLOYEES, along with MRS. HUTNYAN intended to enter
2 the home armed with weapons and wearing body cameras. (*Id.* at ¶ 36.)

- 3 • On March 25, 2016, HERZOG and/or the COUNTY EMPLOYEES called dispatch
4 of the Manhattan Beach Police Department to inform them that they were either near
5 to, or were already at the home with Defendant MRS. HUTNYAN, they were armed,
6 and they were going to enter the home, by force if necessary, because Plaintiff was
7 “squatting in the house”, that MRS. HUTNYAN was the “owner” of the home, and
8 Plaintiff was “inebriated most of the time.” During this conversation Defendants
9 HERZOG and/or COUNTY EMPLOYEES referred to Plaintiff as “the suspect”, and
10 referred to MRS. HUTNYAN as “the victim.” (*Id.* at ¶ 37.)
 - 11 • On March 25, 2016, between 10:00 and 10:30 p.m., Defendants HERZOG, the five-
12 armed COUNTY EMPLOYEES clad in tactical uniform gear and wearing body
13 cameras, along with MRS. HUTNYAN unlawfully entered into the home by force,
14 using the services of a locksmith who used a drill or other equipment to force the
15 lock on the front door of the home and break-in the home to gain access, and did
16 thus unlawfully invade and search the home. Plaintiff was inside the home alone at
17 that time. Plaintiff was struck on his arm and upon his body during this unlawful
18 break-in and invasion into the home. Plaintiff did not consent to this invasion into
19 the home. (*Id.* at ¶ 38.)
 - 20 • During this invasion, Plaintiff was harassed, threatened, intimidated and was told by
21 the Defendants including the COUNTY EMPLOYEES and MRS. HUTNYAN that
22 if he refused to provide them with keys to the home, the hired locksmith would
23 forcibly open all of the other locks to the home. (*Id.* at ¶ 39.)
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- 1 • During this home invasion, all of the Defendants, including the COUNTY
2 EMPLOYEES and MRS. HUTNYAN continually harassed, threatened and
3 intimidated Plaintiff by engaging in various forms of improper conduct and telling
4 him he had to move his cars from the garage. (*Id.* at ¶¶ 40-41.)
- 5 • During the home invasion, Plaintiff called 911 and explained in detail to the CITY
6 OF MANHATTAN BEACH through dispatch of the Manhattan Beach Police
7 Department what was happening to him and that he had retreated in fear to his
8 bedroom. (*Id.* at ¶ 42.)
- 9 • During the invasion, Defendants SWANSON, NGUYEN and MANQUEROS
10 (“CITY EMPLOYEES”), police officers employed by Defendant CITY OF
11 MANHATTAN BEACH through the Manhattan Beach Police Department, arrived
12 at the home, but rather than impartially investigate the incident, the CITY
13 EMPLOYEES failed to follow proper City of Manhattan Beach Police Department
14 procedures in the investigation before, during and after this home invasion occurred.
15 (*Id.* at ¶ 43.)
- 16 • Defendant CITY OF MANHATTAN BEACH and the CITY EMPLOYEES through
17 the Manhattan Beach Police Department failed to take any measures to investigate,
18 inquire, access, act upon, intervene or determine the legality or illegality of the home
19 invasion suffered by Plaintiff and failed to follow proper police procedures. (*Id.* at ¶
20 44.)
- 21 • Due to the harassment, threats and intimidation by all the Defendants, Plaintiff was
22 forced to, and did in fact leave his home that evening out of fear, worry and anxiety,
23 and temporarily resided at a hotel. (*Id.* at ¶ 45.)
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- 1 • In essence, because of the standing of the police officers, Defendants ignored the
2 explanation provided by Plaintiff and instead, chose to and did act illegally. The
3 actions and inactions by Defendants shocked the conscience and demonstrated
4 deliberate indifference and conscious disregard for Plaintiff's life, liberty, well-being
5 and were all in violation of his civil rights. (*Id.* at ¶ 46.)
- 6 • Due to the actions and inactions by each of the Defendants, Plaintiff suffered injuries
7 and damages. (*Id.* at ¶ 47.)
- 8 • Defendant COUNTY OF LOS ANGELES through the Los Angeles County Sheriff's
9 Department caused Plaintiff's injuries and damages through their policies, practices,
10 customs and/or usages that ratify the abuse and misuse of police power and the use
11 of unnecessary and unreasonable means by Defendants COUNTY EMPLOYEES
12 and CITY EMPLOYEES. (*Id.* at ¶ 48.)
- 13 • Each of the Defendants conspired and acted in concert with each of the other
14 Defendants and under color of the authority and pretense of the statutes, ordinances,
15 regulations, customs, or usages, of Defendants COUNTY OF LOS ANGELES and
16 CITY OF MANHATTAN BEACH in authorizing, directing, and/or causing Plaintiff
17 to suffer excessive force in the entering of the home, conducting an unlawful search
18 of the home and Plaintiff's personal property, committing unlawful harassment,
19 threats, course of conduct and intimidation, which was unreasonable and done
20 intentionally, without lawful justification or reason, and was designed to and did
21 cause injury to Plaintiff's rights as guaranteed under 42 U.S.C. § 1983, and the
22 Fourth and Fourteenth Amendments to the United States Constitution, including the
23 right to be free from an unreasonable search of the home, and of Plaintiff's papers
24 and effects, and the right to be free from use of excessive, unreasonable and
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1 unjustified force, and the right to be free from the use of unlawful harassment,
2 threats, course of conduct and intimidation. (*Id.* at ¶ 53.)

- 3 • As a proximate result of the conduct of Defendants, Plaintiff suffered serious injuries
4 to his health, strength, including injuries to his body, his nervous system and
5 emotional injuries causing him to incur general and special damages. (*Id.* at ¶ 54.)
- 6 • Defendant COUNTY OF LOS ANGELES maintains policies, practices, customs,
7 and usages, that condoned, tolerated, and allowed its officers, including Defendants
8 COUNTY EMPLOYEES to commit and execute the unconstitutional use of
9 unnecessary, unreasonable and/or excessive force, unlawful searches and seizures,
10 unlawful harassment, threats, coercion and intimidation; the culture and promotion
11 of Defendant COUNTY EMPLOYEES' unconstitutional use of unnecessary,
12 unreasonable and/or excessive force, unlawful searches and seizures, and unlawful
13 harassment, threats, coercion and intimidation to achieve personal goals and ends;
14 and Defendant COUNTY EMPLOYEES' use of police power for personal reasons
15 and goals. (*Id.* at ¶ 59.)
- 16 • Defendant COUNTY OF LOS ANGELES through their supervisory employees and
17 agents have and continue to have a mandatory duty of care to properly and
18 adequately hire, train, retrain, supervise and discipline its officers, including
19 Defendant's COUNTY EMPLOYEES, so as to avoid unreasonable risk of harm to
20 its citizens including the deprivation of civil rights. (*Id.* at ¶ 60.)
- 21 • Defendant COUNTY OF LOS ANGELES had either actual or constructive
22 knowledge of their deficient policies, practices, customs and usages, particularly
23 when its officers work off-duty in various security positions. As a result of this
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1 failure, Defendant COUNTY OF LOS ANGELES ratified its officers' disregard of
 2 constitutional and statutory rights as alleged herein. (*Id.* at ¶ 61.)

- 3 • The conduct of each of the Defendants was extreme and outrageous with the
 4 intention of causing, or the reckless disregard of the probability of causing emotional
 5 distress, and as an approximate result of Defendant's conduct, Plaintiff suffered
 6 severe emotional distress. (*Id.* at ¶ 66-67.)
- 7 • Plaintiff believed that he would be struck about his body and in fact was struck upon
 8 by his body by Defendants during the invasion of his home on March 25, 2016. (*Id.*
 9 at ¶ 71.)
- 10 • Each of the Defendants acted as the agents, servants, employees, employers,
 11 principals, and/or representatives of each of the remaining Defendants, and each of
 12 them, were acting within the course and scope of this agency, service and
 13 employment. (*Id.* at ¶ 22.)
- 14 • Each wrongful act alleged in the Complaint was done with the express or implied
 15 approval, knowledge and consent, either actual or constructive of all other
 16 Defendants and each Defendant ratified and approved the acts and omissions of each
 17 of the other Defendants. (*Id.* at ¶ 23.)
- 18 • Each of the Defendants acted in concert in furtherance of each other's interests. (*Id.*
 19 at ¶ 24.)

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1 **III. THE COMPLAINT PROVIDES DEFENDANT WITH FAIR NOTICE OF THE**
 2 **CLAIM AND THE FACTUAL ALLEGATIONS SHOW A PLAUSIBLE CLAIM FOR**
 3 **RELIEF.**

4 **1. Applicable Pleading Standards.**

5 The Federal Rules of Civil Procedure have created a “liberal system of notice pleading”
 6 that is applicable to § 1983 claims to the same extent as other claims. (*Leatherman v. Tarrant*
 7 *County Narcotics Unit*, 507 U.S. 163, 168 (1993).) Federal courts may not apply a “heightened
 8 pleading” standard to the liberal pleading requirements of Rule 8(a) in a civil rights case alleging
 9 municipal liability under 42 U.S.C. § 1983. (*Id.* at 164.)

11 Plaintiff acknowledges that as to all causes of action, he must allege “enough facts to
 12 state a claim to relief that is plausible on its face.” (*Bell Atlantic Corp. v. Twombly*, 550 U.S.
 13 544, 570 (2007).) Plaintiff also acknowledges that: “A claim has facial plausibility when the
 14 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 15 defendant is liable for the misconduct alleged.” (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).)

17 However, as long as a plausible claim is pled, the complaint may proceed “even if it
 18 strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very
 19 remote and unlikely.’” (*Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 556.)

21 Further, *Twombly/Iqbal* did not change the FRCP 8(a)(2) requirement that a statement of
 22 the claim be “short and plain.” For example, the Ninth Circuit has held that a two-and-a-half-
 23 page claim consisting of 17 alleging paragraphs stated “plausible” claims for both employment
 24 discrimination under the Age Discrimination in Employment Act and wrongful discharge under
 25 Oregon law. (*Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1048-1049 (9th Cir. 2012).)

27 Additionally, appellate courts addressing the issue uniformly agree that *Iqbal/Twombly*
 28 does not require plaintiff to plead a prima facie case; “the prima facie model is an evidentiary,

not a pleading, standard.” (*Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 53(1st Cir. 2013); *Keys v. Humana, Inc.*, 684 F.3d 605, 609-610 (6th Cir. 2012); *Khalik v. United Air Lines*, 671 F.3d 1188, 1191-1192 (10th Cir. 2012); *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).)

2. The Conspiracy Allegations Impose Liability Against Defendant For All Causes of Action.

The County asserts its motion to dismiss should be granted because plaintiff did not allege facts stating a claim for 42 U.S.C. § 1983, Intentional Infliction of Emotional Distress, and Assault and Battery.

Applying the above-referenced pleading standards here, County’s motion to dismiss should be denied because Plaintiff has pled facts in sufficient detail to proceed under Fed. Rule Civ. Procedure 12(b)(6). Plaintiff’s complaint sufficiently alleges that County acted in concert and agreement with all defendants in a civil conspiracy. (Complaint, ¶¶ 22-24.) In summary, the complaint alleges that the County and the co-defendants committed the following acts: Conspired to maliciously violate plaintiff’s Fourth and Fourteenth Amendment rights by illegally, unlawfully, and under color of authority, break into the home (*Id.* at ¶ 38-41); illegally and unlawfully advised the CITY OF MANHATTAN BEACH that Plaintiff would make fake 911 phone calls to them about the break-in (*Id.* at ¶ 35); entered into the home, violating Plaintiff’s due process rights armed with weapons, dressed in tactical uniform gear and wearing body cameras (*Id.* at ¶ 36); falsely advised the Manhattan Beach Police Department that Plaintiff was “squatting in the house”, that Plaintiff was “inebriated most of the time” and that Plaintiff was “the suspect” (*Id.* at ¶ 37); unlawfully drilled through the lock of Plaintiff’s door, intimidating him, harassing him, threatening him, striking him, by failing to follow proper police

procedures and acting in deliberate indifference and conscious disregard for Plaintiff's rights.

(*Id.* at ¶¶ 38-48.)

The motion to dismiss completely ignores the civil conspiracy allegations contained in the complaint. Under California law, conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who share with the immediate tortfeasors a common plan and/or design in its perpetration. *Saunders v. Superior Court*, 27 Cal.App.4th 832, 845-846 (1994); *Wyatt v. Union Mortgage Co.*, 24 Cal.3rd 773, 74 (1979). By participating in a civil conspiracy, a co-conspirator adopts as his own the torts of his co-conspirators. (*Id.* at 784.) In this way, a co-conspirator incurs tort liability co-equal with the immediate tortfeasors, regardless of whether he or she actually commits the tort herself. *Ibid.* The complaint alleges the defendants, including employees of the County, acted in concert and in furtherance of each other's interests, conspiring to cause the harm alleged. The conspiracy allegations, when read in conjunction with the factual allegations of each cause of action in the complaint, satisfy the pleading requirements of Federal Rule Civil Procedure 8(a), such that even in instances where specific conduct of the County are not alleged, each cause of action passes the *Twombly/Iqbal* standards, such that the motion should be denied.

3. The First and Second Causes of Action Under 42 U.S. § 1983 Each State A Cause of Action Against Defendant.

With respect to the causes of action under 42 U.S.C. § 1983, as against the County of Los Angeles, plaintiff must plead and prove that: 1) County personnel violated plaintiff's constitutional rights while acting under color of state law; and 2) The violation was caused by a policy, practice, or custom of the County. *Monell v. Dept. of Social Servs. of New York*, 436 U.S. 658, 690 (1978).

Here, defendants, including County, had absolutely no right to engage in forcible entry under cover of night armed with weapons and dressed in tactical gear, illegally break into the sanctity of the home and assault Hutnyan. This constitutes a clear violation of plaintiff's Fourth and Fourteenth Amendment rights as alleged in the complaint. The MSA did not give Cafferata or any of her cohorts the right to enter the premises in this fashion. More precisely, the MSA provides that Hutnyan would allow "Petitioner [Cafferata] with access to the marital residence **upon reasonable notice** from Petitioner [Cafferata]. (See MSA, p.11; emphasis added.)

The following soliloquy from Judge Thomas Trent Lewis at the conclusion of the 4-day domestic violence/restraining order trial arising out of the conduct alleged in the instant complaint is enlightening: "I have no quarrel with the petitioner's [Cafferata's] lawful right to have entry to the residence **but there's a right way to do it and there's a wrong way to do it.** She certainly had the lawful right to reoccupy the property. There was no order precluding her from doing so, **but the methodology chosen by the petitioner's agent, Chris Herzog, as to how to implement it was completely out of bounds in my view. And that's a charitable characterization.**

How was it out of bounds? First of all, I don't know who Mr. Herzog thinks he is. I don't know why he dresses the way he does. **But I think it's to intimidate others by creating the impression that he is an off and on-duty officer or that he is possessed of some kind of authority that he is not truly possessed of.**

Now has he broken the law? That's not for me to decide.

Did he file a false police report? I don't need to decide that and I don't decide that.

Did the other officers act – the off-duty sheriff officers act in an inappropriate manner? I think they did in the following respects: First of all, they were asked to identify the agency that they were members of, and they refused to do that, and I'm making a

1 **finding that on this record those officers failed to respond to a lawful inquiry concerning**
 2 **the agency to which they were members. Second, there was no reason to go there at 10:30**
 3 **at night other than to create a bullying atmosphere and intimidation. That's the inference**
 4 **that this court draws.”** (See Plaintiff's Request for Judicial Notice, Exhibit “1” at pp. 3-4;
 5 emphasis added.)

6 Thus, the MSA, contrary to the assertions of the County, and for that matter, common
 7 sense as well as the law, did not give the defendants, including County, *carte blanche* to show up
 8 and invade the home. Defendants' conduct resulted in a 3-year CLETS restraining order issued
 9 against Cafferata. (See Plaintiff's Request for Judicial Notice, Exhibit “2.”) Insofar as
 10 defendants had no right to enter the home, the § 1983 causes of action are adequately pled. The
 11 complaint further alleges that the violation was caused by a policy, practice or custom of the
 12 County. (See Complaint, ¶¶ 53, 58-59.)

13 To the extent that there is a valid cause of action asserted against Cafferata for this
 14 conduct, the complaint is also well pled against the County based on the conspiracy allegations.

15 Indeed, the allegations in the first and second causes of action, combined with the
 16 conspiracy allegations satisfy the *Twombly/Iqbal* pleading standards. These allegations include
 17 sufficient facts to support a plausible legal claim that the acts and conduct of Cafferata, Herzog,
 18 the off-duty Los Angeles County Sheriff's Department officers, the other named defendants and
 19 the Manhattan Beach Police officers (who were on duty), acted in concert with each other, were
 20 acting under color of authority and under the policies, practices, customs and usages condoned
 21 and tolerated of its officers. Plaintiff in this case came face-to-face with the customs and policies
 22 of the County that permit police abuses under the Fourth and Fourteenth Amendments, by
 23 engaging in the proverbial “code of silence,” by claiming that they thought they were going to
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1 plaintiff's home for the unbelievable purpose of "eating pizza, "bake cookies," and "play board
2 games." (See Plaintiff's Request for Judicial Notice, Ex. 1, p.5.)

3 "It is well established that private parties who act in concert with officers of the state
4 are acting under the color of state law within the meaning of § 1983." (*Evans v. McKay*, 869 F.2d
5 1341, 1348 (9th Cir. 1989).)

6 The off-duty status of the law enforcement defendants is irrelevant to the viability of
7 the complaint. Plaintiff bases defendants' liability on the municipal customs and practices and
8 the conduct of the individual policy makers who are acting under color of law. Cases such as
9 *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990) have recognized such a theory. Plaintiff
10 has more than adequately alleged that the municipalities' policies and the actions of its policy
11 makers, acting under color of law, permitting off-duty officers to engage in this type of behavior
12 was foreseeable. Whether plaintiff can establish the requisite causation to a jury, of course, is
13 not ripe for decision.
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16 The Ninth Circuit has developed factors to determine if an off-duty police officer is
17 acting under color of law. (*Anderson v. Warner*, 451 F.3d 1063 (9th Cir. 2006). First, the
18 challenged conduct must be performed while the officers acting, purporting, or pretending to act
19 in the performance of his or her official duties. (*McDade v. West*, 223 F.3d, 1135, 1140 (9th Cir.
20 2000). Second, the officers' pretense of acting in the performance of his duties must have had
21 the purpose or effect of influencing the behavior of others. (*Van Ort v. Estate of Stanewich*, 92
22 F.3d 831, 839 (9th Cir. 1998). Third, the challenged conduct must be related in some meaningful
23 way to either the officers' governmental status or to the performance of his duties. (*Martinez v.*
24 *Colon*, 54 F.3d 980, 987 (1st Cir. 1995).
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1 The facts alleged in the complaint plausibly meet the factors set forth in *Anderson*,
 2 *supra*. First, the officers were purporting to act in the performance of their official duties by
 3 breaking into plaintiff's home, intimidating him, threatening him, while armed, wearing tactical
 4 uniform gear and body cameras. They (or through their co-conspirators) also alerted the on-duty
 5 local police department that they were going to deal with a "suspect." As alleged, it is certainly
 6 plausible that they were acting within the performance of their official duties. Unquestionably,
 7 the officers' pretense of acting in the performance of their duties, by breaking into the sanctity of
 8 plaintiff's home had the purpose or effect of influencing the behavior of plaintiff. Finally, the
 9 conduct was in a meaningful way related to their governmental status in performance of their
 10 duties as it was condoned by the City of Manhattan Beach Police Department and they were
 11 acting within their territorial jurisdiction and directing their actions towards constituents such as
 12 plaintiff.
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14 Ultimately, the officers' off-duty status does not derail plaintiff's claims. Plaintiff's
 15 injuries were allegedly caused by the customs and practices of the County and the actions of
 16 supervisors acting under color of law. *Gibson v. City of Chicago, supra*, held that a municipal
 17 custom and practice was actionable notwithstanding that an off-duty officer inflicted the fatal
 18 shot. (See, also *Garcia v. City of Chicago*, 2003 WL 1715621 (N.D. Ill. 2003) (Upholding theory
 19 that beating by an off-duty officer resulted from the Department's failure to discipline its
 20 officers).) In County's leading cases, *Huffman v. County of Los Angeles*, 147 F.3d 1054 (9th Cir.
 21 1998) and *Van Ort v. Estate of Stanewich*, 92 F.3d 831 (9th Cir. 1996), the plaintiffs failed, not
 22 as a matter of law because an off-duty officer inflicted the harm, but because plaintiffs failed at
 23 **trial** (not at a motion to dismiss under FRCP 12(b)(6)), to establish the causal connection
 24 between the municipal policies and the off-duty officers' conduct.
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Finally, the opposition erroneously states that no violation of the Fourth or Fourteenth Amendment has been alleged, and that only the violations of the Fourth Amendment may be properly alleged. To the contrary, the Fourth Amendment guarantees the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. That is exactly one of Plaintiff's rights violated here. Concurrently, defendants, including County, violated plaintiff's Fourteenth Amendment rights by denying him his liberty and his property, as alleged in the complaint.

4. The Complaint States A Claim For Intentional Infliction Of Emotional Distress.

California law recognizes "severe emotional distress means ... emotional distress of substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." The distress may consist of "any highly unpleasant mental reactions such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." *Fletcher v. Western National Life Insurance Co.*, (1970) 10 Cal.App.3d 376, 397. Ordinary rude or insulting behavior is not enough to justify an award of damages. (See, Rest. Second Torts, § 46, Comment D. ["There is no occasion for the law to intervene in every case where someone's feelings are hurt."]; Comment J [Distress must be so severe that "no reasonable man could be expected to endure it."]; "[A] cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault." (*State Rubbish Collectors Association v. Siliznoff* (1952) 38 Cal.2d 330, 336.)

1 “The extreme and outrageous character of the conduct may arise from the abuse by the
 2 actor of a position, or a relation with the other, which gives him actual or apparent authority over
 3 the other, or power to affect his interests. Thus, in an attempt to extort money by a threat of arrest
 4 may make the actor liable even with an arrest, or threat alone, would not do so. In particular,
 5 **police officers**, school authorities, landlords, and collecting creditors have been held liable for
 6 extreme abuses of their position.” (*Newby v. Alto Rivera Apartments* (1976) 60 Cal.App.3d 288,
 7 297 fn. 2; emphasis added.)

9 The complaint sets forth facts that demonstrate the defendants, including County, who
 10 acted in the course and scope of the conspiracy with the other defendants, participated in conduct
 11 directed against plaintiff, which they knew would cause him to suffer severe emotional distress
 12 by engaging in the egregious conduct of breaking into the home at 10:30 at night, armed with
 13 weapons, wearing body cameras and clad in tactical uniform gear, invading the sanctity of his
 14 home, searching his home, assaulting and battering him, all of which would result in the average
 15 member of a community to arouse his resentment against the actors, and lead him to exclaim
 16 “outrageous.” (See Rest. Second Torts, § 46, Comment D).

18 The opposition maintains the complaint fails because Cafferata had the right to enter
 19 the home. However, neither she, nor any of the defendants was within their rights to invade the
 20 home in the manner alleged. It shocks the conscience. Cafferata had the right to engage in
 21 civilized behavior, such as arranging a mutually convenient time to come to the home during
 22 daylight hours, upon reasonable notice pursuant to the MSA, without the escort of multiple
 23 armed off-duty police officers in full tactical gear, and without alerting the Manhattan Beach
 24 police that Plaintiff was a “suspect” and “inebriated most of the time.” County is equally
 25 culpable for this conduct and their participation in these events is particularly shocking.
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5. The Complaint States A Claim For Assault And Battery.

Assault and battery are crimes as well as torts and the statutory definition of the crimes are in the Penal Code: “An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (Penal Code § 240.) “A battery is any willful and unlawful use of force or violence upon the person of another.” (Penal Code § 242.) In tort actions for assault and battery, courts typically assume these Penal Code definitions and related criminal cases apply. (See *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 742.)

Here, the conduct alleged in the complaint on its face suffices to plead the elements of the tort of assault. The conduct of County, along with its co-conspirators, breaking into the home as set forth above, ultimately causing plaintiff to retreat into his bedroom in fear of an attack amounts to an assault. Further, the complaint specifically alleges that plaintiff believed that he would be struck about his body. (Complaint, ¶ 71.)

The tort of battery has also been alleged as the complaint states that plaintiff was struck upon his body by defendants, all co-conspirators, during the invasion into his home. (*Id.*) These allegations are sufficient to support the battery cause of action.

IV. IF THE COURT GRANTS THE MOTION IN ANY PART, THE COURT SHOULD GRANT PLAINTIFF LEAVE TO AMEND.

If the court grants the motion in any part, the Court should grant plaintiff leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure expressly states that leave to amend “shall be freely given when justice so requires.” Leave to amend should be denied only if the court determines that “allegations of other facts consistent with the challenged pleading could not possibly cure the deficiency.” (*Schreiber Distributing Co. v. Serv -Well Furniture Co., Inc.* (1986) 806 F.2d 1393, 1401.)

V. CONCLUSION

Based on the conduct of all defendants including the COUNTY and its agents/employees as alleged in the Complaint, Plaintiff has pled facts sufficient to state a claim to relief that is “plausible” based on the causes of action against defendants for violation of civil rights, intentional infliction of emotional distress, and assault and battery. Therefore, defendant Cafferata’s motion to dismiss should be denied, or in the alternative, leave to amend the complaint should be granted.

Dated: June 19, 2017

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